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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 404

JACK DAVIS,

Petitioner,

—vs.—

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinion Below

No opinion was rendered by the District Court. The opinions by the Circuit Court of Appeals are reported in 151 F. (2nd) 140.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 8, 1945 (R. 166). The Petition for a Writ of Certiorari was filed September 6, 1945 and was granted November 13, 1945 (R. 168). Jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. Sec. 347 A), and as modified pursuant to the Act of March 8, 1934 (18 U. S. C., Sec. 688), by Rule XI of the Rules of Practice and Procedure After Verdict in Criminal Cases (292 U. S. 661, 666).

Questions Presented

Questions presented by this case are:

1. Is it a violation of the 4th Amendment for officers, after pretending to make an arrest for a misdemeanor committed in their presence but not in the presence of the petitioner, to enter by duress and search petitioner's private office removed from the place of arrest?

2. What are the limitations of a search of premises upon the arrest of a person for a misdemeanor committed in the presence of officers, and did the search in this case exceed the boundaries prescribed in the decisions of this Court?

3. Was the arrest of the petitioner valid, therefore justifying the search and seizure of the gasoline ration coupons as an incident thereof?

4. Did the search for and seizure of the gasoline ration coupons, claimed by the Government to have been made as lawfully incident to the arrest of the petitioner, transgress petitioner's rights under the 4th and 5th Amendments?

Constitutional Provisions, Statutes and Regulations Involved

Constitution of the United States, Amendment 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

"(2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

* * * * *

Ration Order 5 C issued by the Office of Price Administration (7 F. R. 9135 ff. as amended) provides in pertinent part as follows:

"Section 1394.8153. (a) *Coupons issued for registered and commercial motor vehicles.* Transfers may be made and accepted under the following conditions in exchange for Class A, B, C, D, or T coupons having an aggregate unit value equal to the amount of gasoline transferred. However, if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of the coupon, the transferor

shall nevertheless require the surrender of an entire coupon.

* * * * *

"Section 1394.8217. (a) Every dealer and intermediate distributor shall be accountable for all gasoline ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer or distributor is open to transact business, retained by him at the place of business for which they were received, or deposited in a ration bank account maintained for that place of business, until such time as they are surrendered to a dealer or distributor in exchange for gasoline, or otherwise surrendered pursuant to Ration Order No. 5C. The aggregate gallonage value of gasoline deposit certificates, coupons and other evidences on hand or on deposit for each place of business of a dealer or intermediate distributor, shall, at all times, be equal to, but not in excess of, the number of gallons of gasoline which would be required to fill the storage capacity of such place of business, as shown by the current certificate of registration, * * *

"Section 1394.8235 (b) All tire inspection records and gasoline deposit certificates and all coupon books, coupons, and other evidences are, and when issued shall remain, the property of the Office of Price Administration. Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law enforcement officer of the United States or of any state, county, or local government,

every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control, whether valid, invalid, void or expired, and whether or not issued or acquired in accordance with Ration Order 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise than in accordance with Ration Order 5C, whether valid, invalid, void or expired."

Statement

The petitioner was charged in an Information containing four counts with the unlawful possession and control of gasoline ration documents consisting of "A" coupons in sheet form and the unlawful transfer of gasoline ration coupons (R. 3-5). He was convicted in the District Court for the Southern District of New York on one of the counts of the Information, which charged the unlawful possession of 168 gasoline ration documents consisting of "A" coupons in sheet form (R. 2). The jury acquitted the petitioner of the second count of the Information. The two remaining counts were withdrawn on motion by the Government before the commencement of the trial. The count upon which the petitioner was convicted was the same charge upon which a jury had previously disagreed after a trial on a

prior Information, which had been filed in the same court.

Petitioner was sentenced to imprisonment for six months and to pay a fine of $1,000 (R. 2). On appeal, the judgment was affirmed by the Circuit Court of Appeals in and for the Second Circuit (R. 166). The Opinion of the Circuit Court of Appeals was written by the Honorable Learned Hand, Circuit Judge, and a concurring Opinion was written by the Honorable Jerome N. Frank, Circuit Judge (R. 159-165).

The questions raised concern the validity of the search by which the ration coupons, which were introduced in evidence, were obtained. The facts in respect of that issue were developed at a pre-trial hearing before the Court without a jury on a Motion to Suppress (R. 8-9). The petitioner's conviction was based entirely upon his possession of gasoline coupons which were introduced in evidence and resulted from the search and seizure complained of (R. 9, 26). The testimony in respect to this search and seizure may be summarized as follows:

Petitioner is president of a corporation known as Davis Auto Laundry Corporation, which maintained a gasoline station in the Borough of Bronx, City of New York.

On June 20, 1944, two detectives of the New York City Police, Fitzpatrick and Colby, together with three agents attached to the Office of Price Administration, Sussman, Pearman and Tarter, drove near the gasoline station operated by the petitioner (R. 14). They observed the activities of the service station for approximately two hours (R. 59). These officers and agents had no search warrant and they had no warrant for the arrest of the petitioner.

Two of the agents then separately entered the gasoline station and beguiled a female employee, while the petitioner was not present, to make two separate sales of gasoline

at prices in excess of prices authorized by the regulations issued by the Administrator of the Office of Price Administration and without demanding coupons (R. 52-53, 73-75). This female employee, who appeared as a witness for the Government, contradicted the testimony of the agents, and testified that she first discovered that the agents had no coupons after she had sold the gasoline and requested the coupons (R. 74). She further testified that she was misled by the agents, both of whom pretended to be regular customers of the petitioner. She testified further at the pretrial hearing that she would not have sold the gasoline if she had known that the agents had no coupons, or if she had not been fooled by their pretended relationship to the petitioner (R. 88).

The petitioner was not present at the time these sales were made. A short time after these sales, the five officers returned to the premises and questioned the female attendant (R. 15, 24, 55).

While the officers were questioning the female attendant, petitioner arrived at the gasoline station (R. 16-17). The petitioner's automobile, which he drove to the gasoline station, was immediately searched (R. 72).

The officers demanded from the petitioner and received the keys to the tin boxes attached to the gasoline pumps (R. 17). These boxes were opened by the officers and the coupons counted (R. 17). One of the officers began examining and measuring the gasoline tanks and their contents (R. 17).

The petitioner was then taken by two of the officers to a building which consisted of a waiting room and the private office of the petitioner (R. 18). The door to the private office was *locked* (R. 18). Petitioner had given the key to his private office to his partner, named Payne (R. 56).

For at least an hour petitioner was questioned in the waiting room adjoining petitioner's private office by two of the officers. They demanded that he open the door to his private office, which he refused to do. To compel petitioner to open the door to his private office, the following threats were made:

Detective Fitzpatrick testified as follows (R. 19):

> "I explained the law to Davis in that I told him that these were Federal agents, 'They have you now for one rap. The rap is the over-the-ceiling prices of gasoline. You are now under arrest, and any property in the office will be seized by them.' I said, 'The best thing to do is open the door and save a lot of time.'
>
> "He wanted to know what would happen to him. I said, 'Well, you have an OPA violation and you have an arrest now, and this is certainly going to be tough, and if you have any more stuff you might as well give it to him.'"

On cross examination, Fitzpatrick testified that he told petitioner when the petitioner refused to open the door to the private office "they have a perfect right to look the place over. They are Federal agents and any stuff that you have in regards to this ration currency is their property and you are only custodian of it during the time that it goes through your hands" (R. 31-32).*

Agent Sussman admitted upon cross examination as follows (R. 66):

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* Upon the trial Detective Fitzpatrick testified that he warned the petitioner that "he was in the can" (Stenographer's Minutes 275).

"Q. Did you try to convince Davis that he ought to open that door leading into the private office? A. I didn't try to convince him. I told him he would have to open that door."

Agent Sussman also testified that he warned the petitioner that they had a right to go into the private office (R. 61-67). Apparently, while this was going on, another detective was shining a flashlight through a window into the private office of the petitioner (R. 37). Detective Fitzpatrick himself testified that from where he was sitting it looked as though Detective Colby was trying to force the window in the private office and enter (R. 37).

When the petitioner observed this, according to Government witness, Fitzpatrick, he remarked, "He don't need to do that. I will open the damned door" (R. 37).

Apparently agent Sussman had obtained the keys after the other agent had followed Payne and turned the keys over to petitioner, who allegedly opened the door to the private office (R. 37). According to agent Sussman, the petitioner opened his private safe, took out some manila envelopes containing coupons and turned them over to him (R. 57). These are the coupons which were offered in evidence against the petitioner upon the trial as Exhibits 4 and 5 and upon which petitioner's conviction was wholly based (R. 9, 26, 42).

Some mention should be made of the testimony in relation to the alleged arrest of the petitioner because the Circuit Court of Appeals, in its Opinion below, accepted the finding of the Trial Court that petitioner had been arrested (R. 160).

Officer Sussman testified that after petitioner returned to the gasoline station, after the sales had been made by the female attendant, he told the petitioner that he was

under arrest (R. 65). The officer admitted, upon the hearing, that he did not tell the petitioner the charge for which he was arrested (R. 65), and admitted that he had no warrant for the arrest of the petitioner (R. 69).

It is significant that the first time Officer Sussman told the petitioner the nature of the charge for which he was allegedly arrested was after the officers had surreptitiously gained entrance to petitioner's private office and had seized the ration coupons, which were offered in evidence against the petitioner upon the trial. At that time, according to the officer, he told the petitioner that he was arrested for selling gasoline at above ceiling prices and having unlawful possession of "A" coupons (R. 71-72). It is important to mention at this time that petitioner was never charged with the offense of selling gasoline at above ceiling prices without coupons, and it is apparent that the alleged arrest of the petitioner was based upon evidence obtained as a result of the search and seizure, and not upon anything that occurred prior thereto.

Even were we to accept the officers' statement that he told the petitioner that he was under arrest, certain other material facts are not disputed. There is no denial that after the alleged arrest of the petitioner he was not taken to any police precinct or to a United States Commissioner or to any other committing officer. Instead, petitioner was taken to the Office of Price Administration on the same day, where he was questioned for many hours by Mr. Burchill, an Enforcement Attorney (R. 46, 47). Petitioner was allowed to go home, and was released from the custody of the alleged arresting officers that same day (R. 50).

Petitioner was not actually lawfully arrested under any warrant or arraigned before a Commissioner until about a month later (R. 50).

At the close of the pre-trial hearing, the trial judge denied the Motion to Suppress on the ground that there had been voluntary consent to the search (R. 124). At the pre-trial hearing the Government did not strenuously urge that the consent to the search was voluntary, but in fact sought to justify the search and seizure on the ground that since the coupons were the property of the Office of Price Administration, the officers were free to force an entrance into any building and seize whatever coupons they might find (R. 161). Indeed, the Government argued that the officers could enter the premises with guns and ammunition and force "everybody to lay down and search the place without a warrant" (R. 10).

The Circuit Court of Appeals expressed some doubt as to the voluntariness of petitioner's consent (R. 160), and rejected quite strongly the contention of the Government that the regulations of the Office of Price Administration exposed a dealer in gasoline to a general search of his premises (R. 162). The Circuit Court of Appeals held that nevertheless the search was "'reasonable' in the ordinary constitutional sense" (R. 162).

Specification of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In affirming the order of the trial court denying the motion for the return of the gasoline coupons seized as the result of an unreasonable search and the suppression of the same as evidence.

2. In sustaining the legality of the search and seizure made herein.

3. In holding that the arrest of the petitioner justified the search of the premises adjacent as an incident thereof.

4. In sustaining the exploratory search of petitioner's office without the authority of a search warrant and as an incident of the alleged arrest of the petitioner.

5. In holding that the petitioner was lawfully arrested, therefore justifying search for gasoline ration coupons as the instruments or fruits of the crime.

6. In holding that the gasoline ration coupons found in the petitioner's private office were the direct "means of committing" the offense for which the petitioner was allegedly arrested.

ARGUMENT

I

The seizure of the gasoline ration documents in question was the result of an unjustifiable, unreasonable and exploratory search in violation of the guaranties under the Fourth Amendment.

This Court has construed the Fourth and Fifth Amendments in a series of cases since 1885.

Boyd v. *United States*, 116 U. S. 616 (1886);
Adams v. *New York*, 192 U. S. 585 (1904);
Weeks v. *United States*, 232 U. S. 383 (1914);
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 (1920);
Gouled v. *United States*, 255 U. S. 298 (1921);

Burdeau v. *McDowell*, 256 U. S. 465 (1921);
Carroll v. *United States*, 267 U. S. 132 (1925);
Agnello v. *United States*, 269 U. S. 20 (1925);
Byars v. *United States*, 273 U. S. 28 (1927);
Marron v. *United States*, 275 U. S. 192 (1927);
Go-Bart Co. v. *United States*, 282 U. S. 344 (1931);
United States v. *Lefkowitz*, 285 U. S. 452 (1932).

The Fourth Amendment was designed to prevent general exploration searches such as were made by the British in pre-Revolutionary days under authority of writs of assistance. The historical background of that amendment and the interrelationship between the Fourth and Fifth Amendments has been lucidly set forth in the opinion of Mr. Justice Bradley in *Boyd* v. *United States*, *supra*, 116 U. S. 616.

Since the decision of this Court in *Boyd* v. *United States*, *supra*, certain clear doctrines applying the Fourth and Fifth Amendments to specific kinds of search and seizures have been announced by this Court in subsequent decisions.

Throughout all these cases the Court in applying the constitutional rights of the citizen has jealously guarded his home, his office and indeed his entire premises and effects from unlawful entry and unreasonable search and seizure. This Court has consistently condemned any encroachments under "color of Federal office". It has consistently construed the Fourth Amendment to protect the citizen from disorderly intrusion or irresponsible administrative officers.

A review of the cases applying the constitutional guaranties reveals that the following principles have been established:

(1) That the guaranties of the Fourth and Fifth Amendments are liberally construed in favor of the accused.

As this Court stated in *Byars* v. *United States, supra*, 273 U. S. 28, 32:

> "Constitutional provisions for the security of person and property are to be liberally construed and 'it is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon' *Boyd* v. *United States*, 116 U. S. 616, 635; *Gouled* v. *United States*, 255 U. S. p. 304."

(2) The protection of the Fourth Amendment extends to offender as well as the law abiding.

United States v. *Lefkowitz, supra*, 285 U. S. 452, 464;
Weeks v. *United States, supra*, 232 U. S. 383.

(3) That corporations are entitled to the protection against unlawful searches and seizures prohibited by the Fourth Amendment.

Hale v. *Henkel*, 201 U. S. 43 (1906);
Silverthorne Lumber Co. v. *United States, supra*, 251 U. S. 385.

We mention particularly this well-established doctrine because the Solicitor General in his brief in opposition to petitioner's application for a writ of certiorari noted that the gasoline station which was searched in this case was owned by a corporation and not by petitioner (Brief for the United States in opposition, p. 9). The Solicitor General pointed out that this fact was not stressed in the opinion of the court below.

Obviously, this fact has no bearing upon the question involved and requires no stressing.

(4) Unlawful searches are not validated by the fact that they disclose violations of a Federal statute.

In *Byars* v. *United States, supra*, 273 U. S. 28, this Court said (p. 29):

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

(5) An arrest may not be used as a pretext to search for evidence.

> *United States* v. *Lefkowitz, supra*, 285 U. S. 452, 467.

In all of its decisions this Court has given clear notice that it will give the fullest practical effect to the constitutional guaranties.

In passing upon the reasonableness of a particular search, this Court stated explicitly:

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

> *Go-Bart Co.* v. *United States, supra*, 282 U. S. 344, 357.

In the case at bar the trial judge denied the motion to suppress the gasoline documentary stamps which the petitioner contended was obtained as a result of an unreasonable search and seizure, on the ground that there had been voluntary consent to the search (R. 124). This finding of the trial court is so contrary to the government's own evidence that it requires only passing reference. It is true the petitioner did not physically resist the entry of the agents into his private office. He had little or no choice. He was confronted by two city detectives and three agents of the Office of Price Administration who proclaimed and demanded their absolute right to enter his private office. Under such circumstances the petitioner had the choice of preserving simultaneously his physical and his constitutional rights. His decision in these perplexing circumstances to avoid physical harm and injury did not amount to an invitation to enter and search.

Gouled v. *United States, supra,* 255 U. S. 298;
United States v. *Maresca,* 266 F. 713 (S. D. N. Y. 1920);
United States v. *McCunn,* 40 F. (2d) 295 (S. D. N. Y. 1930).

The Circuit Court of Appeals in its opinion in this case declared that it need not decide that the finding of the trial judge is wrong with the following qualification,

> "but we must own to some doubt whether a consent obtained under such circumstances should properly be regarded as 'voluntary' " (R. 160).

Despite this statement by the Circuit Court of Appeals, the Solicitor General in his brief in opposition to petitioner's petition for a writ of certiorari urged again that

the consent of the petitioner to the search and seizure should be deemed to be voluntary because the property which the officers were seeking to examine belonged to the Government. This contention is obviously a juggling of words. A consent is either voluntary or involuntary and the hybrid form of consent urged by the Solicitor General has no support in any decision by any court.

Moreover as pointed out by Circuit Judge Frank, in his concurring opinion in this case, this contention of the government is simply a variant of the argument urged by the government at the pre-trial hearing and upon which the government chiefly relied to support the vicious search and seizure involved in this case (R. 165).

The main contention of the government in the trial court was as follows: Whenever the government validly regulates any business and includes in its regulations a valid requirement that records be kept which shall be open to official inspection, then refusal to produce the records for such inspection authorizes the officers to enter the premises and seize the records. The United States Attorney argued vigorously and strenuously that the officers could enter the petitioner's premises with guns and ammunition and force "everybody to lay down and search the place without a warrant" (R. 10). This contention was strongly rejected by the Circuit Court of Appeals. Circuit Judge Learned Hand wrote as follows:

> "We are very clear that to continue in a business after it has been regulated, as the dispensing of gasoline was regulated, does not expose the dealer to any general search; and that in so far as the prosecution in this case so asserts—as we understand it to do—it must fail" (R. 162).

Circuit Court Judge Frank wrote a concurring opinion only because he thought it was important to underscore the Court's rejection of the main contention of the government (R. 165).

We have therefore this anomalous situation: The Circuit Court of Appeals rejected in effect the finding of the Trial Court as to voluntary consent. It also rejected the government's main contention urged in support of the search and seizure.

The Circuit Court of Appeals however held that the search and seizure was "reasonable" in the ordinary constitutional sense (R. 162).

The Circuit Court of Appeals held that the search and seizure were justified as an incident of petitioner's lawful arrest (R. 163). It is this determination which requires close scrutiny and further discussion.

We recognize the general principle that the Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

Carroll v. *United States, supra,* 267 U. S. 132, 147.

This Court has also recognized the right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place *where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed,* as well as weapons and other things to effect an escape from custody.

Agnello v. *United States, supra,* 269 U. S. 20, 30.

It has been stated that the search can include "all parts of the premises used for the unlawful purpose" and the

objects sought must be "in the immediate possession and control" of the accused.

Marron v. *United States*, 275 U. S. 192, 199.

Separated from the factual situations involved in the cases, the above quotations are not helpful. The language used in some decisions will be found to be broader than the decisions.

As Circuit Judge Hutcheson wrote *in re*: *Ginsburg*, 147 F. (2d) 749 (C. C. A. 2nd, 1945 at p. 750).

> "Based on the Fourth and Fifth Amendments, this is another of those cases in which appellant and appellee, concerning themselves little with the Constitutional words, seize upon particular words in particular cases to roll them as sweet morsels under their tongues."

What is the criterion by which unreasonableness is determined? The Court below has labeled the search involved in the present factual situation as "reasonable" in the "ordinary constitutional sense" (R. 162). The Circuit Court of Appeals has also concluded that the coupons seized were "the direct means of committing the offenses" (R. 163).

Where is the line to be drawn as to whether an object is one with which the crime was committed or whether it is merely evidence of the crime and hence not a proper object of search? The Circuit Court of Appeals in another case held that it would be hazardous to attempt any definition. *United States* v. *Kirschenblatt*, 16 F. (2d) 202, 204 (C. C. A. 2nd, 1926).

Obviously, labels cannot answer the questions involved in this case. This Court has uniformly condemned general exploratory searches such as the vicious type involved in

this case, although the search pretended to follow a lawful arrest.

In *Agnello* v. *United States, supra,* 269 U. S. 20, the facts were similar to the case at bar. Certain defendants were observed by the officers to be making sales of narcotics and were immediately arrested. After the arrest the officers went to the home of the defendant Agnello and without a warrant, searched his room and found a can of cocaine. Objection to its introduction in evidence was first sustained but later in rebuttal, it was admitted. This was held to be by this Court reversible error, the entire scope of the Fourth and Fifth Amendments is discussed and the conclusion reached: (1) that the protection of the Fourth Amendment extends to all those justly suspected or accused as well as the innocent, and that the search of a private dwelling without a warrant is unreasonable and abhorrent to our laws; and (2) that when properly invoked the fifth Amendment protects every person from incrimination by the use of evidence obtained by a search or seizure made in violation of his rights under the fourth Amendment.

Another application of the rule in the *Agnello* case is to be found in *Go-Bart Co.* v. *United States, supra,* 282 U. S. 344.

In *Carroll* v. *United States, supra,* 267 U. S. 132, where this Court justified a search and seizure without a warrant, it recognized the necessary difference between the search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and the search of a ship, motorboat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

The decision that should control this case is *United States* v. *Lefkowitz, supra,* 285 U. S. 452. Indeed, this case differs

in its essential facts from that one so slightly, that what was said in that opinion in characterizing the search made, must apply with equal force to this one. In the *Lefkowitz* case respondents were arrested in the execution of a valid warrant. After the arrest of the respondents the officers not only searched their person but opened and examined and took the contents of the desks of two rooms divided by a partition. The search was made in the room 10 feet wide by 20 feet long in which the respondent was arrested.

In discussing the validity of the search and seizure, Mr. Justice Pierce Butler wrote as follows (p. 464):

"* * * The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States* v. *Kirschenblatt*, 16 F. (2d) 202, 203. *Go-Bart Co.* v. *United States, supra*, 358.

Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search

warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States*, 255 U. S. 298, 310."

The search and seizure were held by this Court to be unreasonable.

In *United States* v. *1013 Crates of Whiskey Bottles*, 52 Fed. (2d) 49 (C. C. A. 2d 1931) property which was admittedly contraband was seized without a search warrant. The agent sought to justify the search as an incident to a lawful arrest. Condemning the search and discussing the extent of a search permissible after a lawful arrest, Circuit Judge Chase wrote as follows (p. 51):

> "Such searches are reasonable when they are fairly within the category of mere incidents of the arrest for the purpose of securing the safety of the officers, as when concealed weapons may be possessed, or for getting the subject-matter or evidence of the crime for which the arrest has been made. They are unreasonable and, because so, unlawful, when the arrest may fairly be said to have been but an excuse for a general exploratory search. Such searches are uniformly without the law, whether conducted under the pretended authority of a search warrant or in the guise of a mere incident of a lawful arrest. *Go-Bart Co.* v. *United States*, 282 U. S. 344."

In *United States* v. *Mills*, 185 Fed. 318 (D. C. N. Y. 1911), the defendants had been lawfully arrested for a conspiracy to avoid the customs law. At the time of their arrest the United States Marshal searched for, seized and removed from the premises a quantity of documents concerning the alleged fraudulent importation and all other business of

defendants. Subsequently these papers came into the possession of the United States Attorney. Upon petition the return of all seized papers was directed, Lacombe, *D.J.*, holding that such a comprehensive seizure of documentary evidence in the premises where an arrest is made constituted an unreasonable search and seizure in violation of the Fourth and Fifth Amendments.

The subsequent history of the case is illuminating. It came to this Court upon a writ of certiorari and this Court dismissed the writ for lack of jurisdiction *Wise* v. *Mills*, 220 U. S. 549 (1911); see also *Wise* v. *Henkel*, 220 U. S. 556 (1911). In its decision this Court intimated that were the case properly before the Court, it would affirm the Court below, because the search and seizure were unreasonable. Thereafter, a writ of error was dismissed by the Circuit Court of Appeals of the Second Circuit for the reason that the order was interlocutory but that Court also stated that it did not approve of unlimited exploratory searches (189 Fed. 583).

See also, *Flagg* v. *United States*, 233 Fed. 481 (C. C. A. 2, 1916); *United States* v. *Mounday*, 208 Fed. 186 (D. C. Kansas, 1913).

In Re: *Ginsburg*, *supra*, 147 F. (2d) 749, the appellant was arrested for the crime for having accepted a bribe. At the time of his arrest the officers searched the apartment in which the appellant was arrested and found large boxes, two of them locked. The officers supposed that these boxes contained further bribe money and proceeded to take and break them open, finding additional cash and securities totalling $73,955. The search was held to be unreasonable because there was no showing that the cash and securities found had any relation to the crime charged.

The Circuit Court in its decision in this case relied chiefly upon a decision of this Court in *Marron* v. *United States*,

275 U. S. 192. It is our submission that this decision has been misapplied and misinterpreted by the Court below. In the *Marron* case officers executing a search warrant for intoxicating liquors found and arrested one Birdsall who, in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest, the officers seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register, which this Court found were in plain view of the officers.

In the *Marron* case the petitioner was charged with the offense of maintaining a nuisance, a specific and new crime created by the Prohibition Amendment. The entire premises and all of its contents were part and parcel of the nuisance. Because of the very nature of the crime everything in the premises became an instrument of the crime. This Court held simply that the officers could search and seize the things plainly visible by which the nuisance was being maintained.

By that decision this Court did not mean to sanction general exploratory searches for evidence. The fact that this Court in two subsequent decisions interpreted its own ruling in the *Marron* case is indicative of the fact that this Court intended that the doctrine of the *Marron* case be strictly limited to the precise facts involved. See, *Go-Bart Co.* v. *United States, supra,* 282 U. S. 344, 358. *United States* v. *Lefkowitz, supra,* 285 U. S. 452, 465.

This Court's own explanation of its ruling in the *Marron* case is as follows (*United States* v. *Lefkowitz, supra,* 285 U. S. 452, 465):

> "These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the *Marron* Case. There, prohibition officers lawfully on the premises searching for liquor

described in a search warrant, arrested the bartender for crime openly being committed in their presence. *He was maintaining a nuisance in violation of the Act.* The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. *The ledger and bills being in plain* view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense. The bills were deemed so closely related to the business that it was not unreasonable to consider them as employed to carry it on. While no use was being made of the book or papers at the moment of the arrest, they—like containers, chairs and tables for customers, the cash register, glasses, and supplies—were kept to be utilized when needed. The facts disclosed in the opinion were held to justify the inference that when the arrest was made the ledger and bill were in use to carry on the criminal enterprise." (Italics ours.)

With due respect to very learned lower court, this is not the first time that the court below has misconstrued or misapplied the doctrine of the *Marron* case.

In *United States* v. *Poller*, 43 F. (2d) 911, 913 (C. C. A. 2d, 1930), the lower court admitted that the question to what extent the premises under the direct control of a man arrested may be searched was a troublesome one.

In *United States* v. *Kirschenblatt*, 16 F. (2d) 202 (C. C. A. 2d, 1926), the lower court limited the extent of the search permissible. However, in a subsequent case, *United States* v. *Gowen*, 40 F. (2d) 593, 598 (C. C. A. 2d, 1930) the Court overruled its own decision in *United States* v. *Kirschen-*

blatt and justified its action on the decision of this Court in *Marron* v. *United States; supra,* 275 U. S. 192.

The subsequent history of the *Gouen* case is important. It was reversed by this Court in *Go-Bart Co.* v. *United States, supra,* 282 U. S. 344.

The lower court admits that there is confusion between cases in other circuits (43 F. (2d) 911, 913) and in its decision in this case confessed that the zone within which a person allegedly arrested for a crime may be searched is undefined (R. 163).

The lower court by its decision in *United States* v. *Lindenfeld,* 142 F. (2d) 829 (C. C. A. 2d, 1944) and by its decision in this case has seriously limited the application of the fourth amendment. This result has been accomplished by extending the zone which may be searched after arrest and by drawing subtle and fine distinctions between "means of committing" a crime and "evidence" of the crime. In other words, the fourth amendment has been emasculated and stripped of its efficacy by the use of stigmatizing labels.

Neither the provisions of the fourth amendment, nor its history or any decision of this Court justify the bold, wilfull and deliberate acts committed by the officers in this case.

When two of the officers induced a female employee not in the presence of petitioner, to make two separate sales of gasoline at "over the ceiling" prices and without coupons, the officers had all the proof they needed of the possible commission of a misdemeanor. The officers were in possession of the marked bills and a memorandum of the sales made by the employee (R. 24).

There was certainly no justification for the search of the petitioner's automobile upon his return to the filling station (R. 56). Petitioner was taken to his office by two

of the officers and threatened and questioned for more than an hour. Another detective attempted to gain access to petitioner's private office, which was locked, by forcing the window (R. 37).

Is there any justification for such brazen conduct? Is there any justification for the ransacking of petitioner's private safe?

The lower court argues that the officers prior to the search must have presupposed that somewhere the petitioner must have a quantity of contraband coupons corresponding to those which he had not taken from his customers, for otherwise he would have been unable to replenish his tanks (R. 163). Are the rights of the petitioner to be determined by supposition?

In *Agnello* v. *United States, supra,* 269 U. S. 20, 33, this Court wrote as follows:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

The officers had no prior knowledge or information that the petitioner had a quantity of gasoline coupons in his possession. Cf. *Carroll* v. *United States, supra,* 267 U. S. 132.

Moreover, it is admitted that the coupons were not plainly visible. They were not at or near the gasoline pumps. They were not on the top of any desk. They were in the safe of a locked private office removed from the petitioner's place of arrest.

Indeed, in every case, including the *Lefkowitz* and *Go-Bart* cases, the officers must have presupposed that the

accused had records or other documents in his possession. But did such a presupposition warrant a general and exploratory search?

The officers had ample opportunity to obtain a search warrant. The records of the petitioner could have been subpoenaed under the regulations and failure to produce the records carried severe penalties.

Is security against unlawful searches dependent upon the "sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime"? Please see, *United States* v. *Lefkowitz, supra,* 285 U. S. 452, 464.

The lower court argues that the gasoline coupons were the direct "means of committing" the offense, and therefore, an extended and thorough search for them was permissible (R. 163).

It should be noted that the misdemeanor allegedly committed in the presence of the officers was the sale of gasoline at excessive prices without coupons. Incidentally, it should be noted, in fact, it should be stressed, that petitioner was never charged with this offense.

The conclusion of the lower court is based upon a doubtful syllogism. The lower court argues that the petitioner must somewhere have a quantity of coupons in his possession, corresponding to those which he had not taken from his customers, for otherwise he would not have been able to replenish his tanks; therefore, the coupons were the direct "means of committing" the offense (R. 163).

It does not necessarily follow that because the owner of a gasoline station makes two sales without coupons, that he must have contraband gasoline coupons in his possession. It might mean merely that the owner of the station could not get as much gasoline as he needed from his sup-

plier for he would have less coupons to surrender. There are several other possibilities.*

By the standard adopted by the lower court, there are very few records or documents which would not come within the definition or classification. By the Court's definition, the scope of the search has been arbitrarily enlarged and the line of demarcation between reasonable and unreasonable searches vanishes.

To sanction such interpretation would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibition of the Constitution intended for the protection of the people against such unauthorized action. *Weeks* v. *United States*, 232 U. S. 383, 394.

If the labeling of an object as an "instrument" or "fruit" of crime can thus determine whether a search falls within or without the prohibitions of the fourth amendment, it is extremely important that these phrases be clearly and explicitly defined. There is certainly no such definition in the statute (Section 612, Title 18, U. S. C. A.) referred to by the lower court in its opinion (R. 163).

As appears from the decisions of this Court, searches for "instruments" or "fruits" of crime referred to searches "such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the

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* Upon the trial the petitioner explained the circumstances surrounding the possession of the gasoline coupons. He testified that his regular customers left with him their gasoline coupons lawfully issued to them (S. M. 430). Petitioner in turn gave to each of his customers a receipt specifying the number and type of coupons left with him (S. M. 425-426). These receipts were surrendered upon the delivery of gasoline (S. M. 426-427). The petitioner was corroborated by four of his regular customers, including an employee of the Department of Parks of the City of New York and a practicing physician (S. M. 490-497). Please Note: The references (S. M.) are to the stenographer's minutes, the original of which were filed with the Circuit Court of Appeals. The appeal in the lower court was heard upon the original minutes and the appendix to Petitioner's brief.

Government, to discover property concealed to avoid payment of duties for which it is liable" or searches made for the "seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime". *United States* v. *Lefkowitz*, *supra*. 285 U. S. 452, 465-466.

Perhaps the best clue to the solutions of the question involved is the conceded fact that petitioner was never arrested for the sale of gasoline without coupons or the excessive prices but for the possession of the unlawful coupons which were discovered as the result of the exploratory search (R. 71-72). Although the officer allegedly told petitioner that he was under arrest immediately after the sales made by the female attendant (R. 65), he was never told of the nature of the alleged charge against him until after the discovery of the coupons in the safe in petitioner's private office (R. 71-72).

Therefore, upon the record of this case and the admissions of the officers, the search actually preceded the alleged arrest.

United States v. *Sully*, 56 F. Supp. 942 (S. D. N. Y. 1944).

In the instant case no search warrant had been obtained by the officers (R. 69). Nor is there any authority under the provisions of Section 612 (2) Title 18, U. S. Code for the issuance of a search warrant in cases involving the commission of misdemeanors. By special provision, the issuance of search warrants has been authorized in cases of the commission of certain misdemeanors such as the violation of the Prohibition Amendment (Section 39, Title 27, United States Code). *In Re Hollywood Cabaret*, 5 F. (2d) 651 (C. C. A. 2d, 1925).

Other statutes, which by specific provisions authorize the issuance of search warrants are Section 173 of the Criminal Code dealing with search warrants for suspected counterfeits (Section 287, Title 18, United States Code), and violations of the Customs Law, Section 1595, Title 19, United States Code.

In 1940, the issuance of search warrants was authorized in connection with the new offense outlawing subversive activities (Section 12, Title 18, United States Code).

There is no authority for the issuance of a search warrant except as specifically authorized by statute.

In Re No. 32 East Sixty-Seventh Street, 96 F. (2d) 153 (C. C. A. 2d, 1938), the Court set aside a search warrant issued in connection with the offense of smuggling and concealing merchandise on the ground that such offense was only a misdemeanor and therefore no search warrant could be issued under any of the above statutes.

In the instant case there is no provision in the statute creating the Office of Price Administration or any regulation which authorizes the issuance of any search warrant upon proof of violation of any of the regulations.

It therefore logically follows in view of the decision of this Court in *United States* v. *Lefkowitz, supra,* 285 U. S. 452, the authority of the officers to search petitioner's place of business certainly was no greater than that which could be conferred by a search warrant issued upon adequate proof. In view of the fact that no search warrant could be issued for the alleged commission of a misdemeanor, then certainly the search and seizure complained of in this case and attempted to be justified as an incident of the arrest of the petitioner, were wholly unauthorized.

Another question presented by this case is whether, in any event, there was a lawful and valid arrest of the petitioner to justify the subsequent exploratory search.

In the first place, there is a serious question whether Office of Price Administration agents have the authority as peace officers to make arrests (Please see, Section 53a of Title 18, U. S. C. A.).

Secondly, the circumstances surrounding the alleged arrest deserves mention.

It is conceded that the petitioner was not taken on the day of his alleged arrest to any police precinct or to the United States Commissioner. Instead he was taken to the Office of Price Administration where he was questioned by a Mr. Burchill (R. 46, 47). The petitioner was released from custody on that day and told to go home (R. 50). The petitioner was not actually lawfully arrested or arraigned before a Commissioner until after a month later (R. 50). It is clear therefore, that in the first place there was no lawful arrest of the petitioner to justify any search. The requirements for a lawful arrest are clearly stated in the recent decision of this Court in *McNabb* v. *United States*, 318 U. S. 332, 342:

> "Congress has explicitly commanded that 'It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial * * *.' 18 U. S. C. §595. Similarly, the Act of June 18, 1934, c. 595, 48 Stat. 1008, 5 U. S. C. §300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that 'the person arrested shall be immediately taken before a committing officer.' Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 U. S. C. §593, which provides that when arrests are

made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forthwith before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest."

The Government is estopped both as a matter of law and as a matter of justice of attempting to justify the search and seizure on the ground of a lawful arrest.

The lower court's contention is very clearly answered by the following portion of the opinion of the New York Court of Appeals in *People* v. *Marendi*, 213 N. Y. 600, 608:

> "'Arrest is the taking of a person into custody that he may be held to answer for a crime.' (Code of Criminal Procedure, section 167.) The defendant was not taken into custody by Officer Murtha 'that he might be held to answer for a crime,' but only that he might be searched."

In the *Marendi* case, the Court of Appeals also wrote that a person arrested must be informed of the cause of the arrest. A police officer "can not arrest a man for one cause, and, when that is exploded, justify for another. Such a doctrine would be an incentive to the loosest practices on the part of public officers and a dangerous extension of their sufficiently great powers. They cannot be too firmly told that there is no such lawful thing as an arrest without an apparent or disclosed cause, to be justified thereafter by whatever may turn up." (213 N. Y. 600, 610.)

In conclusion the following remarks by Mr. Justice Sutherland in *Byars* v. *United States*, 273 U. S. 28, 33, are particularly appropriate:

"The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

We respectfully submit that the searches and seizures here challenged must be held violative of petitioner's rights under the Fourth and Fifth Amendments.

CONCLUSION

The judgment of conviction should be reversed and the information dismissed.

Respectfully submitted,

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